

THE HIGH COURT

[2021] IEHC 769

Record No. 2014/5367P

BETWEEN:

AIDAN MCGUINNESS

PLAINTIFF

-AND-

**ADRIAN GREANEY PRACTISING UNDER THE STYLE AND TITLE OF
ADRIAN GREANEY & CO., SOLICITORS**

DEFENDANT

Judgment of Mr Justice Cian Ferriter delivered on 7th December, 2021

Introduction

1. The Defendant has brought two applications before the Court, both of which are addressed in this judgment. He firstly seeks an Order dismissing the Plaintiff's claim for want of prosecution. He also makes an application, in the alternative, for an Order striking out the Plaintiff's proceedings as frivolous and vexatious or being bound to fail.

Background

2. In these proceedings, issued in 2014 and referred to by the parties to the applications as the "2014 proceedings", the Plaintiff seeks damages for breach of contract, negligence and breach of fiduciary duty on the part of the Defendant solicitor arising out of legal services provided by the Defendant in connection with proceedings instituted by the Plaintiff against Michael F. Butler and Joan Devine practising under the style and title of Michael F. Butler & Company, solicitors bearing record no 2009/10795P (the "2009 proceedings").

The 2009 Proceedings

3. Mr. Butler was a solicitor who acted on behalf of the Plaintiff and other business people in connection with the purchase of Bartragh Island, Killala, County Mayo with a view to developing a golf course on the island. Mr. Butler was also an investor in the venture. The Plaintiff had paid a sum of €276,000 for acquisition of a 12.5% share in the property and business venture and claimed that Mr. Butler was negligent in failing to secure that interest for him in return for his investment sum. The Plaintiff also advanced claims against Mr. Butler in the 2009 proceedings in respect of a second property transaction, concerning the acquisition of a property known as Miller's House, Killala, County Mayo. The purchase of Miller's House by the Plaintiff and five other investors for a sum of €2,150,000 was financed by a loan from Ulster Bank who obtained a first legal mortgage over that property as security for the loan. In short, Mr. McGuinness as plaintiff alleged as against Mr. Butler in the 2009 proceedings that Mr. Butler had failed to ensure that he acquired a 12.5% share in the Bartragh Island property and failed to properly protect the Plaintiff's interests in connection with the acquisition, financing and mortgaging of the Plaintiff's interest in the second property, Miller's House.

The claims in the 2014 proceedings

4. In these proceedings against the Defendant (for ease, "Mr. Greaney") (the 2014 proceedings), the Plaintiff (for ease, "Mr. McGuinness") makes a series of allegations of professional negligence, including that Mr. Greaney dismissed Mr. McGuinness as a client in July 2013 for spurious reasons, that Mr. Greaney reneged on a commitment to see the

prosecution of the 2009 proceedings through to conclusion, that Mr. Greaney failed to act on Mr. McGuinness's instructions in relation to the content of the Statement of Claim and that Mr. Greaney acted negligently in relation to various alleged errors in the pleadings in the case. Mr McGuinness also makes allegations of professional negligence against Mr Greaney, in his Statement of Claim, in relation to a Special Summons taken out in his name which was struck out as an abuse of process and which resulted in a liability for costs against him. He also makes allegations of negligence relating to alleged failure on the part of Mr Greaney to act on his behalf in relation to Ulster Bank. Mr Greaney has filed a full Defence to the claims of Mr McGuinness in the 2014 proceedings and maintains forcefully that the claims are baseless and that he has no liability.

5. Mr Greaney fairly observes at paragraph 29 of his affidavit grounding the strike-out application, *"as is apparent from the pleadings, there is a dispute between the Plaintiff and the Defendant, specifically with regard to what was said, what was known and what was advised by your deponent and counsel. I say and believe the within proceeding is not a case that could be confined to documentary evidence"*.
6. I will return to this averment in the context of Mr Greaney's application to have the proceedings struck out as being bound to fail.

Mr McGuinness's 2013 proceedings against Mr Greaney

7. The 2014 proceedings were not the first proceedings launched by Mr McGuinness arising out of the services provided by Mr Greaney in connection with the 2009 proceedings. Mr. McGuinness instituted proceedings against Mr. Greaney in July 2013 by way of Summary Summons, within a short period of his alleged dismissal by his legal team in the 2009 proceedings. These proceedings were summary proceedings bearing High Court Record No. 2013/3048S. In these proceedings, Mr. McGuinness claimed as against Mr Greaney for the sum of *"€40,336.71 being money payable by the Defendant to the Plaintiff for monies expended on costs to the date of the withdrawal by the Defendant and his instructed senior and junior counsel for the action in High Court, Record No. 10795P/2009"*.
8. It appears that Mr. Greaney brought an application to have those proceedings struck out. That strike-out application came before Ms. Justice Baker (then in the High Court) on 13th May, 2014. Baker J. ordered that the action be dismissed and ordered Mr McGuinness to pay Mr Greaney the costs of one day's hearing of the motion. She placed a stay on execution of the costs order for two months with liberty to Mr McGuinness to apply for an extension of the stay. (It appears that there may have been a subsequent application for an extension of the stay granted by Ms. Justice Baker).
9. Mr. McGuinness has exhibited an extract from the transcript of that hearing in May 2014. This transcript extract demonstrates that Ms. Justice Baker put a stay on recovery of costs for two months in anticipation that Mr. McGuinness *"might commence proceedings by Plenary Summons"* and that if he did, he might come back to Court *"and look for a stay on recovery of costs on the basis that you might be entitled to a set-off"*.

10. Mr. McGuinness says that this was the context in which he then instituted the 2014 proceedings. Mr. McGuinness says that he had not, at the time of institution of the 2013 proceedings, appreciated the difference between a Summary Summons and a Plenary Summons and that he commenced the 2014 proceedings in the manner anticipated by Baker J.

Amendment of the 2009 proceedings

11. Following Mr Guinness and Mr Greaney parting ways in July 2013, Mr McGuinness continued to prosecute the 2009 proceedings against Michael F. Butler & Co., solicitors himself, as a lay litigant. In October 2014, he delivered an Amended Statement of Claim in the 2009 proceedings. The amendments to the Statement of Claim included amendments relating to an asserted loss arising from an agreement entered by Mr McGuinness on 11th February, 2008 with a senior counsel, Brendan Kilty, for the sale of his interest in the properties to Mr. Kilty for €700,000. Mr. McGuinness alleged in the Amended Statement of Claim that he was sued by Mr Kilty in proceedings instituted in March 2008 "*due to the failure of the first named Defendant [Michael F. Butler] to properly register the Plaintiff as owner of the property in suit*". Mr McGuinness also included in his Amended Statement of Claim a claim for "*damages for loss of opportunity suffered by the Plaintiff as a result of losing the benefit of the agreement with Brendan Kilty due to the negligence, breach of duty and breach of contract on the part of the first named Defendant*".
12. Mr. Greaney asserts that Mr. McGuinness, as Plaintiff, was advised strongly against the inclusion of such claims in the original Statement of Claim, and that the failure by Mr. McGuinness to accept this advice was one of the reasons why counsel (and therefore Mr. Greaney) were no longer prepared to act for Mr. McGuinness in respect of the 2009 proceedings. That is all disputed by Mr. McGuinness.

Settlement of the 2009 proceedings

13. It appears that Mr. McGuinness settled the 2009 proceedings in January 2016 with the assistance of Mr. Denis Boland, a solicitor based in Newbridge, County Kildare, who commenced settlement negotiations on Mr. McGuinness's behalf in respect of the 2009 proceedings in July 2015. The relevant Terms of Settlement have been exhibited by Mr. McGuinness. In his submissions in support of the within strike out applications, Mr. Greaney contends that there is no stateable remaining claim for loss against him in the 2009 proceedings in circumstances where Mr. McGuinness achieved a good settlement outcome in respect of the 2009 proceedings.
14. Mr. McGuinness disputes this at paragraph 7 of his replying affidavit where he says that his total cash outlay in regard to his share of the purchase of Bartragh Island and Miller's House was €534,500 which left him out of pocket to the tune of €574,000 when taking into account the €40,000 or so he says he paid to Mr. Greaney in respect of the 2009 proceedings. Mr. McGuinness avers that he simply had to take the cash settlement at the time having borrowed a substantial sum of money from his son. He also points out that he is still being held liable by Ulster Bank, who continue to pursue him in respect of proceedings commenced in 2012, for a sum of €2,343,045. It seems clear that Mr.

McGuinness seeks to pursue by way of damages against Mr Greaney in these 2014 proceedings the sums for which he claims he remains out of pocket in respect of the purchase of Bartragh Island and Miller's House.

Other proceedings

15. The Terms of Settlement of the 2009 proceedings made reference to proceedings instituted by Michael F. Butler against the widow of one of the co-investors in the development (being the late Sean Sutton) in respect of which, according to paragraph 6 of the Terms of Settlement, Mr. Butler expected to succeed, and *"that outcome ought to result in the Plaintiff's entitlement to a 12.5% shareholding in Killala Island Limited being recognised by Patricia Sutton"*. Mr. Butler committed in the Terms of Settlement that he would *"not compromise or settle the [2015 proceedings against Mr. Sutton's widow and others] other than on terms that recognise [Mr. McGuinness's] 12.5% shareholding in Killala Island Limited"*.
16. The Terms of Settlement also recognised that Mr. McGuinness was "entitled to issue his own proceedings against Patricia Sutton to enforce his entitlement to a 12.5% shareholding in Killala Island Limited. Alternatively, he is entitled to await the outcome of the proceedings referred to in the previous paragraph which, if successful, would clarify his entitlements".
17. It appears that Mr. McGuinness did take out independent proceedings in 2017 and was ultimately joined as a Notice Party to Mr. Butler's proceedings against the widow of the late Mr. Sutton and Killala Island Limited.
18. It appears that the trial of those matters came before Mr. Justice Jordan in the High Court in February 2019 and a settlement was achieved in respect of those matters.

The 2009 taxation proceedings

19. Mr. McGuinness avers that on 20th February, 2019, while in the precincts of the High Court (in connection with the Butler v. Sutton proceedings concerning the ownership of Bartragh Island), he was served with a Bill of Costs on behalf of Mr. Greaney.
20. This appears to have been a Bill of Costs taken out by Mr. Greaney relating to the costs which Mr. Greaney claimed he continued to be owed in respect of the services provided to Mr. McGuinness in respect of the 2009 proceedings. It appears from Mr. McGuinness's affidavit that as of June 2020, a sum of some €68,544 was being claimed by Mr. Greaney against Mr. McGuinness in connection with the services provided by Mr. Greaney in relation to the 2009 proceedings. I will refer to these taxation of costs proceedings as the "2009 taxation proceedings".

Ulster Bank's proceedings

21. Finally, by way of further background, Ulster Bank had sued Mr. McGuinness and his co-investors (Sean Sutton, Michael Butler, Mel Flanagan, John McCann and Philip Staunton) by summary proceedings in 2012 for the amount of €2,343,045 (arising from the loan finance provided by Ulster Bank in connection with the acquisition of Miller's House). Following Ulster Bank serving a Notice of Intention to Proceed in those proceedings on

21st August, 2019, Mr. McGuinness brought an application to dismiss Ulster Bank's claim against him for want of prosecution. This claim was heard on 13th July, 2020 and dismissed by Mr. Justice MacGrath in a judgment of 7th August, 2020.

Prosecution of the 2014 proceedings

22. In support of his strike out applications, the Applicant, Mr. Greaney, sets out in his grounding affidavit a table of the chronology of the steps taken in the 2014 proceedings, which I reproduce below:

Date	Event
17 June 2014	Plenary Summons issued
26 June 2014	Appearance entered
3 July 2014	Statement of Claim delivered
11 July 2014	Affidavit of Verification sworn but exhibits missing
29 July 2014	Plaintiff brings motion seeking to direct delivery of Defence. This motion was premature.
31 July 2014	Notice for Particulars raised on Statement of Claim.
31 July 2014	Defence delivered.
31 July 2014	Defendant raises voluntary discovery request.
19 December 2014	Personal Service of the voluntary discovery request was effected in circumstances where the Plaintiff repeatedly denied receiving the Defendant's request for voluntary discovery.
26 January 2015	Replies to Particulars delivered.
8 June 2015	Motion seeking to strike out the Plaintiff's claim for failure to make discovery (as previously agreed and promised)
5 July	Defendant's request for voluntary discovery.

2015	
14 December 2015	Order for discovery made compelling Plaintiff and Defendant to make discovery.

23. It is agreed by Mr. McGuinness that this table accurately sets out the relevant chronology.
24. It will be noted that the last item in the table, being the Order made on 14th December, 2015, compelling the Plaintiff and Defendant to make discovery, imposed an obligation on both the Plaintiff and Defendant to make discovery. From the other material before the Court, it appears that the relevant Court Order specified that each party make discovery by 8th February, 2016.
25. It is clear from the exhibited material that there was correspondence between the parties relating to the potential settlement of the proceedings in the period from 10th January, 2016 (when the Plaintiff wrote to the Defendant's solicitors proposing a compromise of the proceedings) to August 2016. Mr. Greaney, for his part, avers that the offer contained in the 10th January, 2016 letter was rejected and *"without prejudice correspondence ensued which ended in Spring 2016"*.
26. Mr. McGuinness has exhibited his own chronology of correspondence (which I have taken to be largely "without prejudice" correspondence) exchanged between 3rd February, 2016 and 24th August, 2016 (the latter involving a letter from the Defendant's solicitors, Ronan Daly Jermyn, to Mr. McGuinness). The relevant without prejudice exchanges in that period also involved letters sent by Mr. McGuinness to Michael Houlihan & Partners, who it appears were the solicitors on record for Mr. Greaney in respect of the 2009 taxation proceedings addressing the question of the taxation of Mr. Greaney's claimed costs as against Mr. McGuinness arising out of the services provided to Mr. McGuinness in connection with the 2009 proceedings.
27. Neither Mr McGuinness nor Mr Greaney complied with their discovery obligations. Mr. McGuinness asserts on affidavit that he prepared his discovery in the 2014 proceedings *"in mid 2016"* and that he then *"patiently awaited the discovery from Ronan Daly Jermyn in case there was a duplication"* but, he says, *"this never materialised"*. I will return to this matter later in the judgment.
28. Mr. McGuinness served a Notice of Intention to Proceed in the 2014 proceedings on 21st October, 2019. He frankly avers in his affidavit that he *"was left with no option but to file a Notice of Intention to Proceed because of [the Defendant's] opportunistic attempt to reopen the taxation process by serving me with a related Bill of Costs in the precincts of the High Court on 20 February, 2019"*.
29. The latter reference appears to have arisen in the following context. Mr. McGuinness has averred (and it has not been disputed by replying affidavit) that following a costs hearing before Taxing Master Ms. Rowena Mulcahy on 25th June, 2015 (in the 2009 taxation

proceedings) it was ordered that he be provided with the solicitor's file in relation to correspondence, e-mails and telephone memos between Mr. Greaney and a Sinead Noonan. He said that he has still not received that file and that "*the taxation hearing suddenly stopped with no further action taken until 20 September, 2019 (5 years later)*". Mr. McGuinness asserts that any claim for costs by Mr. Greaney (arising out of the 2009 proceedings or the 2013 proceedings referred to earlier) is "*co-dependent*" on his negligence case against Mr. Greaney in the 2014 proceedings. Mr. Greaney did not seek to take issue, by way of replying affidavit, with Mr. McGuinness's allegation that the 2009 taxation proceedings initiated by Mr. Greaney against Mr. McGuinness in respect of the costs of the 2009 proceedings effectively lay dormant from June 2015 until Mr. McGuinness was served with a Bill of Costs in the precincts of the Four Courts on 20th February, 2019 (the apparent without prejudice attempts to resolve the costs matter in the period January to July/August 2016 having failed).

The applicable legal principles – strike out for delay/want of prosecution

30. There is no dispute as to the principles applicable to an application to strike out for want of prosecution. It is convenient to adopt the summary of the applicable principles set out in the judgment of Mr. Justice MacGrath delivered on 7th August, 2020 in respect of an application brought, as it happens, by Mr. McGuinness, to strike out for want of prosecution debt collection proceedings brought in 2012 by Ulster Bank against Mr. McGuinness and other parties arising out of loan finance furnished by the Bank in respect of the intended golf course development on Bartragh Island. (Mr Greaney was not involved in those proceedings).
31. Those principles were summarised by MacGrath J. as follows:-

[2] The test applicable on this application is that which was enunciated in Primor v. Stokes Kennedy Crowley [1996] 2 I.R. 459, as subsequently developed. Mr. McGuinness relies on dicta of Hamilton C.J. and also on the decision of the Court of Appeal in Millerick v. Minister for Finance [2016] IECA 206, where Irvine J. (as she then was) summarised the position as follows:-

- "17. The principles which apply on an application brought to dismiss proceedings for inordinate and inexcusable delay are fully explored in the written submissions that have been delivered by the parties. The most oft cited decision is that of the Supreme Court in Primor plc v. Stokes Kennedy Crowley [1996] 2 I.R. 459 where guidance is given concerning the proper approach to be adopted by the Court when met with such an application.*
- 18. The Court is obliged to address its mind to three issues. The first is to decide whether, having regard to the nature of the proceedings and all of the relevant circumstances, the plaintiff's delay is to be considered inordinate. If it is not so satisfied the application must fail. If, on the other hand the Court considers the delay inordinate it must then decide whether that delay can be excused. If the delay can be excused, once again the application must fail. Should the Court conclude that the delay is both inordinate and inexcusable it*

must not dismiss the proceedings, unless it is also satisfied that the balance of justice would favour such an approach.

19. *In considering where the balance of justice lies the Court is entitled to have regard to all of the relevant circumstances pertaining to the proceedings including matters such as delay or acquiescence on part of the defendant and the potential prejudice resulting from the delay."*

[3]. *At para. 32 on p. 12, Irvine J. continued:-*

"32. *In light of the submissions made by Mr. McGovern concerning the defendant's failure to identify any specific prejudice arising from the delay, a further point needs to be made concerning the approach of the Court to the third leg of the Primor test. It is clear from the relevant authorities that in the presence of inordinate and inexcusable delay even marginal prejudice may justify the dismissal of the proceedings. (See Cassidy v. The Provincialate [2015] IECA 74). That is not to say, however, that in the absence of proof of prejudice the proceedings will not be dismissed. The Court is entitled to take into account all of the circumstances of the case including the list of factors outlined by Hamilton C.J. which are conveniently summarised in the head note of the Primor decision."*

[4] *Thus, if the court concludes that the delay is both inordinate and inexcusable, it must proceed to consider where the balance of justice lies and in so doing, may take into account a number of factors considered to be relevant including the conduct of the parties to the proceedings, the number and complexity of the events and transactions required to be recalled, whether it is a so called documents case; and any other matter which may bear on the case, or its future conduct, including prejudice, established, presumed or inferred."*

Application of those principles to the facts here

Delay – inordinate

32. It is clear on the basis of the authorities that the delay in the prosecution of the 2014 proceedings in the period from 14th December, 2015 to 21st October, 2019 is inordinate.

Delay – excusable?

33. The case law entitles me to take into account, as a potential excusing factor for lapse of time, the fact that the parties were engaged in attempts to resolve matters. While I am prepared to accept that reasonable excuse for the delay exists in the period from December 2015 to August 2016 (on the basis that there were without prejudice attempts to seek to resolve matters in that period), I do not accept that there is a reasonable excuse for Mr. McGuinness's delay in prosecuting the proceedings between the end of August 2016 and October 2019. Mr. McGuinness says that he had his discovery documentation prepared by mid-2016 but was waiting to receive Mr Greaney's discovery before making his. I do not believe that this was an excusable course of action. Mr. McGuinness had instituted proceedings making allegations of professional negligence

which, by their nature, sought to impugn the professional reputation of Mr Greaney. It behoved Mr. McGuinness to see through those proceedings, in particular when the attempts at resolution of these proceedings (and the 2009 taxation proceedings) had not proved successful and had run into the ground by August 2016.

34. I do not accept that it was a sufficient excuse for taking no further step in the period of just over three years from August 2016 to October 2019 for Mr. McGuinness to point to the fact that he was waiting for discovery from Mr Greaney. Mr McGuinness never took the step during that period of calling upon Mr Greaney to provide his discovery or otherwise to advance his prosecution of the proceedings.
35. I will return to the fact that Mr Greaney did not comply with the Court's discovery Order against him of 14th December, 2015 when considering the balance of justice below.
36. Accordingly, I find that there has been inordinate and inexcusable delay of a period of just over three years in the prosecution of these proceedings.

Balance of Justice

37. I turn now to consider whether the balance of justice favours the dismissal of the proceedings. It is clear from the authorities that in considering where the balance of justice lies, the Court is entitled to have regard to all of the relevant circumstances including matters such as delay or acquiescence on the part of the Defendant and the potential prejudice to the Defendant resulting from the Plaintiff's delay.
38. Counsel on behalf of Mr Greaney states that he does not have to show particularly significant prejudice stemming from the delay, and that, as pointed out by Irvine J. (as she then was) in *Millerick v. Minister for Finance* [2016] IECA 206, relatively modest prejudice may suffice to tip the balance of justice in favour of dismissal of the proceedings. Mr Greaney emphasises the fact that the nature of the claims in the proceedings is such as to involve serious allegations against his professional competence and therefore his professional reputation and standing, and that there is an added onus on a plaintiff making such serious allegations to prosecute his proceedings without delay (see *Ahearne v. O'Sullivan & Ors.* [2020] IEHC 46 (Simons J.) at paragraphs 42 and 43; see also *Millerick v. Minister for Finance* [2016] IECA 206 (Irvine J. at paragraph 37).
39. Counsel for Mr Greaney points out that the relevant events in issue in these proceedings range from 2009 to 2013. He did not press the point made in Mr Greaney's affidavit that there is a real risk that due to the passing of time and an inherent failing of memories that he would be unable to have a fair trial; it appears that all of the likely relevant witnesses are alive, in good health and available, and the point is made on behalf of Mr McGuinness that the relevant meetings and encounters are presumably the subject of notes and other documentation.
40. However, Mr. Greaney averred that the professional negligence proceedings against him have had and continue to have serious implications financially and reputationally for him. He averred that his professional indemnity insurance has increased on renewal as a direct

result of the within proceedings (although he does not say when, for what years and by how much). He further averred that:

"this increase in premia has resulted in my having to terminate the provision of pro bono services to a vulnerable community service group which I incorporated in 1994. That organisation serves the elderly, the young, the disabled and marginalised. It is a socio-economically disadvantaged area of the city. I say that my broker has advised me at insurance renewal last November [i.e. November 2019] that even a notification out of abundance of caution on any other matter will make it very difficult if not impossible for my broker to secure professional indemnity insurance on the open market for my practice going forward".

41. Those averments were made on 29th July, 2020. I am taking it, in the absence of any further affidavit being filed on behalf of Mr. Greaney, that the concerns he articulated in his affidavit of 29th July, 2020 have yet to come to pass. It is difficult to assess the full gravity of the averred state of affairs in the absence of more particular dates and financial information. In particular, it is not pointed out whether that prejudice has coincided with the period of inexcusable delay, i.e. from August 2016 to October 2019. Further, it is not explained from when the increase in professional indemnity insurance has stemmed or what the quantum of such increase is.
42. Notwithstanding those reservations as to the strength of the evidence, I am prepared to accept, on the basis of these averments, that some prejudice has resulted to Mr. Greaney as a result of the delay in prosecution of the proceedings.
43. However, in my view, there are a number of significant counter-veiling circumstances which tip the balance against dismissal of the proceedings, notwithstanding Mr. McGuinness's inordinate and inexcusable delay, and notwithstanding the fact that there has been some degree of prejudice as a result occasioned to Mr. Greaney. In particular, it seems to me that two factors weigh in the scales of justice against the dismissal of the proceedings.
44. Firstly, there has been culpable delay on the part of Mr. Greaney in failing to comply with the High Court's discovery Order of 15th December, 2015: see in this regard the dicta of Fennelly J. in *Anglo Irish Beef Processors v. Montgomery* [2012] 3 IR 510 (at p 519 when he endorses what Henchy J. said in *Domhnaill v. Merrick* [1994] IR 15 at 157), as endorsed by Irvine J. (as she then was) in the *Court of Appeal in Flynn v. Minister for Justice & Ors.* [2017] IECA 178 at paragraph 31:

"When considering any allegation of delay or acquiescence by the Defendants, it would be careful to distinguish between any culpable delay in taking any step in the action and mere failure to apply to have the Plaintiff's claim dismissed"

45. Both parties were under Court Order and therefore under obligation to take an important step in the proceedings, being that of making discovery; neither complied with that

obligation and I think Mr. Greaney can fairly be said to have acquiesced – at least to some material degree - in the delay in the circumstances.

46. Secondly, it seems to be very relevant in assessing the balance of justice to have regard to the events which precipitated Mr. McGuinness's revival of the proceedings. It seems fair to infer that parties were letting lie their respective sleeping dogs between mid-July 2016 and early 2019, in circumstances where Mr. Greaney had taken no further steps to prosecute his 2009 taxation proceedings (involving costs in the sum of some €68,000) and where Mr. McGuinness had taken no further steps to prosecute these 2014 proceedings.
47. I accept Mr. McGuinness's contention that there is an intrinsic link between the subject matter of these two different proceedings. If Mr. McGuinness is successful in his negligence claims against Mr. Greaney, he will seek to have the Court declare that he is not liable for the costs of the 2009 proceedings. I do not think it would advance the interests of justice, in the particular facts of this case, to have Mr. McGuinness's claims for negligence as against Mr. Greaney in respect of the conduct of the 2009 proceedings dismissed in circumstances where that would leave Mr. Greaney with a "free run" to recoup costs he says he is owed by Mr McGuinness arising from his conduct of the very same proceedings and where (based on the evidence before me) Mr Greaney took no step himself to prosecute the costs proceedings for well over 3 years. The 2009 taxation proceedings and these 2014 proceedings can fairly be described as related proceedings both arising as they do from the prosecution of Mr McGuinness's 2009 proceedings.
48. Given the factors I have identified as weighing in the scales on the balance of justice, and given that, with the likely availability of all relevant witnesses and documentation, it will be possible to have a fair trial of the 2014 proceedings, I believe that the balance of justice favours not exercising my discretion to strike out the 2014 proceedings for want of prosecution.
49. Accordingly, I refuse Mr. Greaney's application to have the 2014 proceedings dismissed for want of prosecution.
50. It is important to emphasise that the Court is unlikely to be tolerant of any further delay on the part of either party in the prosecution of the 2014 proceedings. In particular, both parties will need to deliver their discovery (the Court having ordered that they do so almost six years ago at this point) and get the trial of the 2014 proceedings on for hearing as quickly as possible.

Application to dismiss for abuse of process on basis Plaintiff's claims are bound to fail or are vexatious

51. I will turn next to Mr. Greaney's application to have Mr. McGuinness's proceedings dismissed as an abuse of process, pursuant to the Court's inherent jurisdiction, either on the basis that Mr. McGuinness's claims are bound to fail or on the basis that the claims are frivolous and vexatious.

Plaintiff's claims bound to fail

52. The authorities are clear that in assessing whether a plaintiff's claims are bound to fail, the plaintiff's version of facts underpinning the claims, where there is a dispute, must be accepted. As noted earlier in this judgment, Mr Greaney fairly accepted in his affidavit grounding the application that there is a dispute as to what was said, what was known and what was advised by Mr. Greaney and counsel, in relation to the 2009 proceedings. In my view, if Mr McGuinness's version of the facts is accepted (and I appreciate that his version of events is hotly contested), Mr McGuinness's claims cannot be said to be bound to fail. He alleges that Mr Greaney failed to comply with material instructions and omitted a key claim from the proceedings as instituted. I do not think it can be said, per the passage in *Lopes v. Minister for Justice, Equality & Law Reform* [2014] IESC 21 at paragraph 2.9 relied upon by counsel for Mr Greaney, that there is no credible basis upon which Mr McGuinness may be able to establish the facts which he says ground his claims in professional negligence.
53. Counsel for Mr Greaney made a further submission to the effect that even if it could be said that there was some arguable basis for breach of contract or failure to follow instructions, matters were overtaken by the subsequent settlement in January 2016 of the 2009 proceedings. It is asserted that the effect of the settlement is that there can be nothing left for Mr McGuinness to claim against Mr Greaney in the 2014 proceedings.
54. Again, I am obliged at this juncture to take the Plaintiff's claim at its height. Mr. McGuinness as plaintiff has set out on affidavit his contention to the effect that he is still left with a considerable shortfall arising from the alleged negligence of the defendant, notwithstanding the settlement, which shortfall he seeks to pursue in these proceedings. It seems clear from the Supreme Court decision in *Keohane v. Hynes* [2016] IESC 66 that a Court will be very slow to exercise its jurisdiction to strike out proceedings as being bound to fail where there is an arguable case in breach of duty but where there is alleged to be no demonstrable loss or other adverse consequences (see judgment of Clarke J (as he then was) at paragraph 75.)
55. Accordingly, while Mr McGuinness's claims both as to liability and quantum might well be regarded as weak and while Mr Greaney may well ultimately prevail, I am not satisfied that the application to have the claims struck out as being bound to fail satisfies the tests in the case law and accordingly I do not accede to the strike out application under this heading.

Strike out 2014 proceedings as being vexatious?

56. A separate submission was advanced by counsel on behalf of Mr. Greaney to the effect that even if the claims ought not be struck out on the basis that they are bound to fail, they should be struck out on the basis that the proceedings are frivolous and vexatious as they are being maintained for the ulterior purpose of being used as leverage by Mr McGuinness against Mr Greaney in respect of the Defendant's separate taxation proceedings claiming costs against the Plaintiff arising out of the 2009 proceedings i.e. the 2009 taxation proceedings.

57. Mr Greaney relies in this regard on the averment of Mr. McGuinness at paragraph 24 of Mr McGuinness's replying affidavit as follows:-

"Mr. Greaney's comment in paragraph 23 (while accepting that both issues are related) of me resurrecting the within proceedings is for the sole purpose of using them as some form of leverage in respect of the costs being pursued in the 2013 proceedings is correct, I was left with no option but to file a Notice of Intention to Proceed because of his opportunistic attempt to reopen the taxation process by serving me with a related Bill of Costs in the precincts of the High Court on 20 February, 2019".

58. However, Mr. McGuinness further avers in his affidavit (at paragraph 31) *"given what has been detailed in this affidavit, there can be no doubt that these proceedings and the taxation process are both linked and related. I am claiming a refund of fees paid and he is looking for more fees for a job not only not completed but in doing so I am alleging he was negligent"*.
59. The averment of Mr McGuinness in paragraph 24 of his replying affidavit, relied upon to ground this head of the strike out application, needs to be seen in the context of that further averment. In my view, Mr McGuinness's revival of his 2014 proceedings in response to Mr Greaney's revival of the related 2009 taxation proceedings cannot be said, when objectively viewed, as involving an ulterior motive or an abuse of process of the very exceptional type which would justify the 2014 proceedings being dismissed as being for a vexatious or improper purpose. Both parties left their respective actions dormant for over 3 years. The revival by one party of his action against the other was inevitably going to waken all sleeping dogs.
60. Accordingly, I also refuse the Defendant's application to dismiss the proceedings as being an abuse of process either on the grounds that the Plaintiff's claims are bound to fail or that the proceedings are vexatious or frivolous.

Conclusion

61. In the circumstances, I will refuse all the relief sought by the Defendant on this application.